United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7286

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P/S

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FOR THE SECOND CIRCUIT

MANUEL M. KOUFMAN,

Plaintiff-Appellant,

against

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee,

BENDERSON DEVELOPMENT COMPANY, INC.,
and JACK CHESBRO,

Defendants.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Except for the four matters raised in appellee's brief, and hereinafter considered, the conflicting positions of both litigants are, in our judgment, clearly presented for resolution by this Court.

(i)

We have invoked the doctrine of estoppel in Point One of our main brief. In its answer IBM has relied solely on the decision in *Commission on Ecumenical Mission etc.* v. *Roger Gray, Limited* (1971), 27 N.Y. 2d 457, 318 N.Y.S. 2d 726. IBM asserts in effect that in any and every situation whatsoever, be the result just or unjust, that decision requires as a sine qua non, the statutory written authority for the agent.

At the outset we note that, contrary to IBM's contention at various places in its brief, we have not invoked the gen-

eral corporate law or rules of agency respecting corporations, to validate the contract which Roper signed for IBM, that is to say, we have not claimed that because corporations can act only through individuals, the signature is the corporation's act, not the agent's. We expressly disclaimed that position at pp. 12-13 of our main brief where we said "The contract here was *not an isolated* attempt by Roper to commit IBM without authority. If it were, we would not be here." It is implicit in our main brief that in the ordinary situation Roper would be an agent needing written authority.

But this is an extraordinary situation. Our proof is overwhelming,—indeed, no refutation has been attempted by IBM—that routinely, day after day, in the regular course of their dealing with architects, builders and developers, Roper and a phalanx of other minor IBM employees signed a multitude of contracts and leases similar to and as important as the one in issue. Concededly, they were authorized to negotiate. Their signing of these documents must have been authorized or accepted since IBM acknowledged and performed them in every instance, save only the one at bar.

Nothing decided in *Ecumenical Mission, supra,* precludes the application of estoppel to our set of facts. It is unfair to say, as IBM says at p. 14 of its brief, that the Court dismissed as irrelevant the fact "that Aprahamian had in the past arranged lease extensions". Far from doing that, the Court took great pains to state that those prior lease extensions were completely "different" (the Court's word) from the one before the Court:

> "But since reference is made to prior lease extensions arranged by the employee-agent, it is appropriate to show how different they were and thereby demonstrate a salutary consequence of the statute which might otherwise seem harsh in effect."

"It is true that Aprahamian had in the past arranged lease extensions. In each case but one the tenant was required to return the extension subscribed with his acceptance, or to give notice of acceptance by registered mail, before the extension became binding. In the exception, the extension was not to become binding until a full formal lease extension was signed by the tenant. In each instance, the language of the letter is that of one to whom the English language is evidently the mother tongue with a suggestion of legal terminology. In this case, these characteristics are absent. Most important is that Aprahamian's letter does not bind the tenant. It is unilateral in form, requires and carries no acceptance, and was 'missing' from landlord's files. It is a comparison of these letters, if support were relevant, which justifies a Statute of Frauds applicable to agents who purport to execute leases or extensions by informal letter on behalf of their principals, even if alive." (27 N.Y.2d at 466; 318 N.Y.S.2d at 732.)

Plainly, the application of estoppel was not justified because of the absence of "acts of a similar nature" referred to in Restatement, Agency 2d (1958), § 43, 2b, quoted at p. 8 of our main brief.

How far a cry is this from our set of similar acts! Having accepted all those acts but one, IBM should not now be heard to dishonor its agent, Roper, and repudiate his signature in this single instance, to the harm of Koufman who dealt with Roper and IBM in utter good faith.

Our inability to cite any prior decision applying estoppel to overcome the lack of written authority is no reflection on our position. The genius of the common law is that it arises out of first instances. Such an instance is here.

(ii)

At p. 27 of its brief, IBM denies our assertion that it was *itself* constructing the Cranford building and controlled the completion date. The Pre-Trial Order to which IBM refers, states in effect that the developer was to sign the building contract with the successful contractor. That is literally true. But IBM, without consulting Koufman, had selected and formally contracted with the architect. Without consulting Koufman, that architect had completed his plans and specifications. Without consulting Koufman, IBM had prepared the invitation to bid and the form of contract on which the contractors were to bid. IBM controlled the choice of the successful contractor. The successful contractor had to follow the architect's plans and specifications and the method and time of performance prescribed in the contract. IBM had committed itself to pursue commencement of the building as "expeditiously" as possible. What was left for Koufman? Only to sign the building contract and pay the interim and construction costs. Therefore, our statement that IBM was doing the building *itself* is essentially accurate for the purpose for which we made it, namely to show that IBM controlled the construction schedule and completion date. Our use of italics *"itself"* was meant to emphasize that fact.

(iii)

At p. 26 of its brief, IBM contests our assertion that Koufman was the beneficiary of its agreement (126a-128a) with Chesbro to pursue the commencement of the building as "expeditiously as possible." The IBM acceptance letter (2[illegible]a) supports our assertion. It directed Koufman "to secure the land for which IBM has arranged in your name." The arrangement referred to is the Chesbro agreement (126a-128a).

(iv)

Finally, IBM seeks at p. 29 of its brief, to create a cost-of-money burden to be borne by Koufman if he is the person having the responsibility of paying, initially, the taxes and insurance. This, by reason of an assumed delay of a week or two by IBM in making each reimbursement to Koufman. The alleged cost-of-money figure is illusory. Each payment by Koufman would create an obligation in IBM to repay, that obligation would carry interest and Koufman would be made whole.

This attempt by IBM to raise an inconsequential order of paying the taxes and insurance to the rank of a material omission negating the contract for incompleteness, is ingenious but unpersuasive.

Conclusion

To allow IBM to renege on this contract, and thus in effect to be free to pick and choose at its pleasure, among its multitude of similar contracts which it will accept and which reject, would sanction using the statute as a trap for unwary bidders. We cannot believe that the legislature fashioned the statute with such a result in mind, or that this Court which now interprets the statute, will condone such conduct.

Dated: October 15, 1975.

Respectfully submitted, etc.

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